IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.12.2005

CORAM:

THE HON'BLE MR. JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR. JUSTICE K.MOHAN RAM

A.S.Nos.834 of 1989 and
569 of 1989

Central Bank of India
Rep. by its Regional Manager .. Appellant in
A.S.No.834 of 1989(Plaintiff)

Central Bank of India
(A Nationalised Bank)
Rep. by its Manager, N.Gururajan
No.1, Alaiamman Kovil Street,
Teynampet, Chennai - 600 018 .. Respondent in
A.S.No.569 of 1989 (Plaintiff)

-Vs-

Antony Hardware Mart,
Rep. by its Proprietor, K.Subbiah,
113, Eldams Road, Teynampet, .. Respondent in
Chennai - 600 018. A.S.No.834 of 1989 (Defendant)

Antony Hardware Mart,
Rep. by its Proprietor, S.Viswanathan,
113, Eldams Road, Teynampet, .. Appellant in
Chennai - 600 018. A.S.No.569 of 1989 (Defendant)

Appeals against the judgment and decree dated 28.03.1988 made in O.S.No.8937 of 1986 on the file of the Learned XV Assistant Judge, City Civil Court, Madras.

For Appellant : Mr. K.Ramakrishna Reddy for
M/s. Kalpa Reddy

For Respondent : Mr. Badri Narayanan for
M/s. Sampathkumar Associates.

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J U D G M E N T

(Judgment of the Court was delivered by K.Mohan Ram, J.)

The defendant in O.S.No.8937 of 1986 on the file of the XV-th Assistant Judge City Civil Court, Madras is the appellant in A.S.No.569 of 1989. The plaintiff in O.S.No.8937 of 1986 on the file of the same Court is the appellant in A.S.No.834 of 1989.

2. For the sake of convenience, the parties are referred to as per their ranking in the suit.

3. The plaintiff filed a suit for decree against the defendant for a sum of Rs.39,030.90 with interest at 17.5% per annum from the date of suit till date of realisation on the basis of the following averments in the plaint:

The plaintiff is a Nationalised Bank. The defendant is the proprietor of M/s. Antony Hardware, at No.113 Eldams Road, Teynampet, Chennai - 600 018. At the request of one Thiru S.Kandaswamy, proprietor of M/s.Ramesh Textiles, Eldams Road, Teynampet, Chennai - 600 018, the plaintiff granted cash credit facility to him to an extent of Rs.30,000/- on 23.08.1985. The defendant stood as a guarantor for repayment of the dues of S.Kandaswamy. The said S.Kandaswamy was declared as an insolvent by the High Court Madras in I.P.No.23 of 1986. The defendant had executed a guarantee on 23.08.1985.

4. The defendant filed a written statement containing the following defence:

The suit as framed is not maintainable in law. The grant of cash credit facility to M/s. Ramesh Textiles is not known to the defendant and the defendant has not stood as a guarantor for repayment of the dues of said S.Kandaswamy. The defendant had never been in acquaintance with S.Kandaswamy, Proprietor, Ramesh Textiles, Eldams Road, Chennai - 18. The defendant is unaware of the I.P. proceedings against the said S.Kandaswamy. The defendant does not owe to the plaintiff any sum much less a sum of Rs.39,030.90. The defendant has not stood or executed any guarantee on 23.08.1985. The defendant perused the second document in Court and emphatically states that the signature found in the letter of guarantee is not

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his signature. There had been no notice whatsoever from the plaintiff to the defendant. Since as per the plaint averment, the cash credit facility is on hypothecation of goods, the first charge is over the hypothecated goods in favour of the Bank. Therefore, in the case of insolvency proceedings, the Bank would be entitled to recover the entire sum from the goods. On the above said pleadings, the defendant prayed for the dismissal of the suit.

5. On the above said pleadings, the Trial Court framed the following issues, viz.,

i) Whether the plaintiff is entitled for the suit claim?

ii) Whether the suit as framed is maintainable?

iii) To what relief the parties are entitled to?

During Trial, the plaintiff examined one Gururajan as P.W.1 and got marked Exs.A-1 to A-5. On the side of the defendant, the defendant got himself examined as D.W.1, but did not mark any documents. On a consideration of the oral and documentary evidence adduced in the case, the Trial Court passed a conditional decree in favour of the plaintiff in the following terms:-

i) The defendant is liable to pay a sum of Rs.39,030.90 with 17.5% interest per annum there on, from 01.12.1986 till the date of payment of the decree amount.

ii) The defendant should pay a sum of Rs.4,838.25 towards cost to the plaintiff.

iii) The sum of Rs.5,797/- paid by the defendant after the filing of the suit should be credited.

iv) However, the decree can be executed against the defendant only after proceeding against the principal debtor S.Kandaswamy, his hypothecated goods and his other properties and that too if the decree amount could not be realized.

6. The defendant aggrieved by the above said decree, has filed the appeal in A.S.No.569 of 1989. The plaintiff being aggrieved by Clause-IV of the decree has filed the appeal in A.S.No.834 of 1989, since both the above said appeals arise out of the judgment and decree dated 28.03.1988 passed in O.S.No.8937 of 1986, a common judgment is being passed.

7. Mr. K.Ramakrishna Reddy, learned counsel for the defendant made the following submissions:

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Ex.A-2 guarantee has not been executed by the defendant. Since the defendant had denied his signature in Ex.A-2, the burden is not on the defendant but it is on the plaintiff to prove that the signature found in Ex.A-2 as that of the defendant. The Trial Court ought not to have compared the signature by itself. Ex.A-2 is only meant for future advances and it is not in respect of existing liability of the principal debtor. The contents of Ex.A-2 were not read and explained to the defendant. Ex.A-2 is a printed form wherein, unnecessary words have not been struck off. Regarding the admission of D.W.1 about the signature in Ex.A-5, the learned counsel submitted that D.W.1 has deposed without understanding the question put to him and as such the admission of D.W.1 should not be relied upon and the loan sanction order has not been produced. Learned counsel further submitted that the Trial Court erred in comparing the signatures by itself without getting an expert's opinion from the hand writing expert. On the above submissions, the learned counsel sought for setting aside the judgment and decree of the Trial Court.

8. Learned counsel for the plaintiff-Bank made the following submissions:

The Trial Court is entitled to compare the disputed signatures with the admitted signatures under Section 73 of the Indian Evidence Act. D.W.1 has admitted his signature in Ex.A-5 and this Court, as a final Court of facts, can compare the disputed signature in Ex.A-2 with the admitted signature in Ex.A-5. It is not necessary that in all the cases an expert opinion should be obtained. Ex.A-5 handed over by the defendant, contains the details of his assets and properties and nobody else except the defendant could have furnished those details contained in Ex.A-5 and that itself will prove the falsity of the defence taken by the defendant. The Trial Court has considered all the aspects and has rightly decreed the suit, but Clause – IV of the decree is unsustainable, since it is settled law that the plaintiff can proceed against the Guarantor even without proceeding against the principal debtor and on that ground, clause – IV of the decree should be set-aside and the appeal filed by the defendant has to be dismissed.

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9. At the outset, we want to point out that the Trial Court has committed an error in comparing the signatures in Ex.A-2 and Ex.A-5 with the admitted signature of the defendant in the Vakalath and written statement. In the judgment reported in 1999 (3) C.T.C. 156 (Somasundaram Vs. Palani) this Court has held as follows:

> "Even though the Court may have the power to compare the signatures, there must be some admitted signature of the defendant, on the basis of which a comparision will have to

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be made. In this case, a comparision has been made on the basis of signatures affixed by defendant in the vakalath and written statement, which are documents that have come into existence after the dispute arose, and after the promissory note in question was filed into Court along with plaint. A comparision should not have been made on the basis of those signatures. If that be so, it has to be held that the comparision was not made in accordance with law, even though the Court is empowered to make a comparison".

It is settled law that the disputed signature can be compared with admitted signature, which were contemporaneous and not with the admitted signatures obtained subsequent to the date of the disputed signature. By lapse of time, there may be some difference in the signature of a person. Only based on that principle, the above said judgment has been rendered by the learned single Judge of this Court. Therefore, the Trial Court erred in comparing the signatures in Ex.A-2 and Ex.A-5 with the signatures found in the Vakalath and written statement of the defendant.

10. The Trial Court has pointed out that the Manager of the Bank, who wrote Ex.A-2 has not been examined and that itself may not be a ground to disbelieve the case of the plaintiff, if there are other evidence to prove the case of the plaintiff. The Trial Court has observed that when the defendant had denied his signature in Ex.A-2, it is the defendant's duty to summon his admitted signature from the Indian Bank where he is holding an account and prove that the signature in Ex.A-2 is not his signature. This observation of the Trial Court is wrong. Since, it is the duty of the plaintiff to establish his case, the Trial Court has erred in casting the burden on the defendant. Now, we have to see whether the plaintiff has proved his case and whether the contentions raised by the learned counsel for the defendant are acceptable.

11. Learned counsel for the defendant relied upon a judgment reported in 2003 (11) S.C.C. 241, (Pawan Kumar Vs. State of Haryana). In that judgment, the Honourable Supreme Court in paragraph no.8 has held as follows:

"The next circumstance which has been alleged against the accused is a letter written by the appellant to his mother. So far as this letter is concerned, it has been admitted in evidence to show that the appellant had confessed his guilt. But in that letter, there is no admission whatsoever, much less confession, in relation to the complicity of the appellant with the crime. That apart, P.W.10, who has proved this letter, was suggested

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> that the same was forged and fabricated in which eventuality it was incumbent upon the prosecution to prove the handwriting and signature of the appellant thereon by sending it to the handwriting expert, but no such step was taken for reasons best known to the prosecution. Thus, this circumstance also could not be proved."

Relying upon the above said judgment, the learned counsel for the defendant contents that when the signature in Ex.A-2 is disputed by the defendant, the plaintiff ought to have taken steps to send Ex.A-2 to a handwriting expert for getting his opinion regarding the signature in Ex.A-2. Since the plaintiff has not taken any steps to get the expert's opinion, it should be held that the plaintiff has not proved that the signature found in Ex.A-2 is that of the defendant. The above said judgment has been rendered in an appeal arising out of a criminal trial relating to an offence under Section 302 I.P.C. where the principle of proving beyond reasonable doubt is applicable, but in civil cases, the proof beyond reasonable doubt is not necessary. But if the plaintiff is able to establish preponderant possibilities in his favour, then this Court may grant a decree in his favour. As laid down by the Apex Court in several other judgments, the hand writing experts opinion is not the only mode by which the signature can be proved. But there are other modes by which the disputed signature can be proved. Hence we are of the view that the above said judgment will not further the case of the plaintiff.

12. Learned counsel for the plaintiff/appellant relied upon another judgment of the Apex Court reported in 1992 (3) SCC 701 (State of Maharashtra thro' CBI Vs. Sukhdev Singh @ Sukha and Others). In paragraph 32 at page 730, the Supreme Court has held as follows:

> "It was then submitted, relying on Section 73 of the Evidence Act, that we should compare the disputed material with the specimen/admitted material on record and reach our own conclusion. There is no doubt that the said provision empowers the Court to see for itself whether on a comparison of the two sets of writing/signature, it can safely be concluded with the assistance of the expert opinion that the disputed writings are in the handwriting of the accused as alleged. For this purpose we were shown the enlarged copies of the two sets of writings but we are afraid we did not consider it advisable to venture a conclusion based on such comparison having regard to the state of evidence on record in regard to the specimen/admitted writings of the Accused 1 and 2. Although the section

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specifically empowers the Court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard. We have already pointed out the state of evidence as regards the specimen/admitted writings earlier and we think it would be dangerous to stake any opinion on the basis of mere comparison. We have, therefore, refrained from basing our conclusion by comparing the disputed writings with the specimen/admitted writings."

Relying on the above said passage, learned counsel submitted that neither the Trial Court nor the Apex Court had endeavoured to compare the disputed signature with the admitted signature in the absence of an expert's opinion. If we carefully read the above said passage, it will be clear that the Honourable Supreme Court refused to compare the signature by observing as follows:

"*We did not consider it advisable to venture a conclusion based on such comparison having regard to the state of evidence on record in regard to the specimen/admitted writings of the accused 1 and 2.* Although, the section specifically empowers the Court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of mere comparison, *more so, when the quality of evidence in respect of specimen/ admitted writings is not of high standard.* We have already pointed out the state of evidence as regards the specimen / admitted writings earlier and we think it would be dangerous to take any opinion on the basis of mere comparison". *(Italics supplied).*

In that case, the Honourable Supreme Court has held that the quality of evidence in respect of specimen / admitted writings is not of high standard and hence refrained from comparing the disputed signature with the admitted signature. But in the case on hand, the position is different, which we will point out little later.

13. In this context, we would like to refer to a judgment reported in 1999 (6) SCC 104 wherein, the Supreme Court has held that when the defendant denies his signature in all the documents shown to him, the Trial Court could have compared the signatures of the defendant as provided in Section 73 of the Indian Evidence Act. In 2003 (3) SCC 583 (Lalit popli Vs. Canara Bank and Others), the Supreme Court has held as follows:

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"Irrespective of an opinion of the handwriting expert, the Court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible under Section 73 of the Evidence Act. Ordinarily, Sections 45 and 73 of the Evidence Act are complementary to each other. Evidence of handwriting expert need not be invariably corroborated. It is for the Court to decide whether to accept such an uncorroborated evidence or not. *It is clear that even when an expert's evidence is not there, the Court has power to compare the writings and decide the matter. (emphasize supplied).*

14. In the judgment reported in 2001 (2) Law Weekly 334, the Division Bench of this Court, by relying upon a judgment of the Supreme Court of India reported in 1998 (2) SCC 192 (Gulsar Ali Vs. State of H.P.), has held as follows:

"In order to prove the identity of the handwriting any mode not forbidden by law can be resorted to. Two modes are indicated by law in Sections 45 and 47 of the Evidence Act. Section 45 of the Act permits expert opinion to be regarded as relevant evidence and Section 47 permits opinion of any person acquainted with such handwriting to be regarded as relevant evidence. In this regard the following conclusion of the Supreme Court in Gulzar Ali Vs. State of H.P. in 1998 (2) S.C.C. 192 is relevant. Their lordships have held that it cannot be said that identity of handwriting of a document can be established only by resorting to one of those two sections, namely Sections 45 and 47".

The Division Bench has further held that it is clear that though normally the Court should not take upon itself the responsibility of comparing the disputed signature with that of the admitted signature, undoubtedly the Court is competent to compare the disputed signature with the admitted signature in view of Section 73 of the Act. However, if the Court has any doubt, it is incumbent on it to leave the matter to the opinion of an expert.

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15. In this context it is useful to refer to the evidence of D.W.1. In his cross-examination D.W.1 has stated as follows:

"என்னிடம் கொடுக்கப்பட்ட ஆவனத்தில் உள்ளது என் கையெழுத்து. Ex.A-5 அந்த ஆவனம். 31.03.1985-ல் முடிய உள்ள என் சொத்து விவரங்களை Ex.A-5-ல் சொல்லி இருக்கிறேன் "

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Having admitted his signature in Ex.A-5, in the later part of his deposition D.W.1 has stated as follows:

> "Ex.A-5-ல் கண்ட கையெழுத்தும், வக்காலத்தில் கண்ட கையெழுத்தும் என்னுடையது தான் என்பது தவறு. Ex.A-3-ல் உள்ளது என்னுடைய கையெழுத்து அல்ல".

This retraction on the part of D.W.1 could only be an after thought. When he has categorically admitted his signature in Ex.A-5 and when he has also admitted the contents in Ex.A-5 stating that he has given the details of his properties in Ex.A-5, D.W.1 has chosen to go back on his admission. He has gone to the extent of denying his signature in the vakalath. The contention of the learned counsel for the appellant that D.W.1 has admitted his signature in Ex.A-5 without properly understanding the question put to him cannot be accepted. In this context, we want to refer to a judgment of the Supreme Court reported in A.I.R.1981 S.C. 2085 (Ramji Dayawala & Sons (P) Ltd., Vs. Invest Import), wherein the Honourable Supreme Court has held as follows:

> "Admission, unless explained, furnishes the best evidence".

If we apply the above said law laid down by the Supreme Court to the facts of this case, the admission made by D.W.1 is the best evidence as far as Ex.A-5 is concerned. As held in 1999 (6) S.C.C. 104 (K.S.Satyanarayana Vs. V.R.Narayana Rao), in this case also the defendant was trying to get out of the situation by contradicting his signature found in Ex.A-5 with his signature in the vakalath, in order to defeat the claim of the plaintiff. In such a situation, the Supreme Court has held that the Trial Court could have also compared the signatures of the defendant as provided in Section 73 of the Indian Evidence Act. In this case, the Trial Court, instead of comparing the disputed signature in Ex.A-2 with the signature found in the vakalath and written statement, should have compared the admitted signature of the defendant found in Ex.A-5 with the disputed signature found in Ex.A-2. We compared the disputed signature in Ex.A-2 with the admitted signature in Ex.A-5 and we do not find any dissimilarity between two signatures. We are of the view that the signature found in Ex.A-2 and the signature found in Ex.A-5 are similar and is that of the same person.

16. Apart from the fact that Ex.A-2 has been executed by the defendant, he has also handed over Ex.A-5 containing the details of

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his properties and assets. Nobody else could have furnished those details except the defendant. The contention of the defendant that it could have been created by the Bank cannot be accepted. There is absolutely no evidence on record to hold that the Bank has created Ex.A-2 and Ex.A-5. We fail to understand as to why the Bank should create a document against the interest of the defendant. Exs.A-5 and A-2 clearly establish that the defendant has stood as a guarantor for the loan advanced to S.Kandaswamy .

17. Learned counsel for the defendant contents that Ex.A-2 was not read over and explained to the defendant and it is a printed form and it is meant for future advances only. According to the learned counsel for the defendant there is no evidence to show that after 23.08.1985 any amount was advanced as loan to the principal debtor. Learned counsel drew our attention to Ex.A-2. The first few lines of Ex.A-2 reads as follows:

> "In consideration of order at my / our request making advance or otherwise given credit to Ramesh Textiles, hereinafter referred to as "the member".

Relying upon the above passage the leaned counsel contents that even if any guarantee is proved to have been given by the defendant, it will be only in respect of future advances to be made to S.Kandaswamy and not in respect of any existing liability. We are unable to accept the same. The words "otherwise given credit to Ramesh Textiles, hereinafter referred to as the principal", will indicate that the guarantee is also in respect of loan already given to Ramesh Textiles, namely, the principal debtor.

18. The contention of the learned counsel for the defendant that since no notice has been issued by the plaintiff to the defendant calling upon him to pay the loan and that will raise a doubt regarding the genuineness of Ex.A-2, cannot be accepted. It is not mandatory to issue notice in all cases. The plaintiff has examined its manager as P.W.1 and nothing has been elicited in his cross- examination to discredit his evidence. He has spoken about the loan transaction between the Bank, the principal debtor and the defendant. When we have found that Ex.A-2 guarantee has been executed by the defendant, the natural consequence is to hold him liable for the suit claim, for which he stood as a guarantor. It is not disputed that the principal debtor has been adjudged as an insolvent by the High Court in I.P.No.23 of 1986. The hypothecated goods were sold in the insolvency proceedings and only a sum of Rs.5,792/- has been given to the plaintiff. The Trial Court has rightly directed that the said amount should be given credit

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towards the decree amount. The Trial Court has rightly accepted Exs.A-5 and A-2. Therefore, we hold that the defendant is liable for the suit claim to the plaintiff.

19. We now take up A.S.No.834 of 1989 filed by the plaintiff. Learned counsel for the plaintiff relying upon a judgment of the Supreme Court reported in A.I.R.1992 S.C. 1740, submitted that Clause – IV of the decree of the Appellate Court is liable to be set aside. In that judgment the Supreme Court has held as follows:

> "Section 128 of the Indian Contract Act itself provides that 'the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract'. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgage decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor".

In view of the provisions contained in Section 128 of the Indian Contract Act and in the light of the law laid down by the Apex Court in A.I.R.1992 S.C. 1740 Clause – IV of the decree is liable to be set-aside and accordingly Clause - IV of the decree is hereby set-aside. The Trial Court erred in directing the plaintiff to first proceed against the principal debtor and his properties and then to proceed against the defendant if the suit claim could not be recovered. This part of the decree is against law and hence it is liable to be set-aside and accordingly it is set-aside. Consequently, A.S.No.834 of 1989 filed by the plaintiff is allowed and A.S.No.569 of 1989 filed by the defendant is dismissed; however there will be no order as to costs. The decree of the trial court shall stand modified accordingly.

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Asst.Registrar

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Sub Asst.Registrar

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To,

The Registrar,

City Civil Court, Madras.

2. The Section Officer,
VR Section,
High Court, Madras.

2 ccs to Mr.P.Kalpa Reddy, Advocate, SR.49195, 49194

vc (co)

dv/29.11.06

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